

1 PHILLIP C. SAMOURIS, ESQ. (Bar No. 163303)  
2 samouris@higgslaw.com  
3 MICHELLE L. GRANT, ESQ. (Bar No. 220083)  
4 grantm@higgslaw.com  
5 401 West "A" Street, Suite 2600  
6 San Diego, CA 92101-7913  
7 TEL: 619.236.1551  
8 FAX: 619.696.1410

9  
10 Attorneys for Specially Appearing Defendant  
11 VIEJAS BAND OF KUMEYAA Y INDIANS, a  
12 federally recognized Indian tribe, erroneously sued  
13 as "VIEJAS FIRE DEPARTMENT"

14  
15  
16  
17  
18  
19  
20  
21  
22  

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

23 JIM MAXWELL and KAY  
24 MAXWELL, individually and as  
25 guardians of TREVOR ALLEN  
26 BRUCE and KELTEN TANNER  
27 BRUCE; and JIM MAXWELL, as  
28 executor of the ESTATE OF  
KRISTEN MARIE MAXWELL-  
BRUCE,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; ALPINE  
FIRE PROTECTION DISTRICT;  
VIEJAS FIRE DEPARTMENT;  
DEPUTY LOWELL BRYAN "SAM"  
BRUCE; DOES 1-50,

Defendants.

CASE NO. 07 CV 2385 JAH WMC

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN REPLY TO  
PLAINTIFF'S OPPOSITION TO  
THE MOTION TO DISMISS FILED  
BY SPECIALLY APPEARING  
DEFENDANT VIEJAS BAND OF  
KUMEYAA Y INDIANS**

CASE FILED: December 19, 2007  
IC JUDGE: Hon. John A. Houston  
DEPT: 11 (2nd Floor)  
DATE: March 3, 2008  
TIME: 2:30 p.m.

23 Specially Appearing Defendant VIEJAS BAND OF KUMEYAA Y  
24 INDIANS (hereinafter the "Viejas Band" or the "Band"), a federally recognized  
25 Indian tribe, erroneously sued as the "VIEJAS FIRE DEPARTMENT" (hereinafter  
26 "Viejas Fire Department"), respectfully submits the following reply brief in support  
27 of its motion to dismiss for lack of subject matter jurisdiction.

1  
I.2  
**REPLY**3  
**A. Plaintiffs Erroneously Rely On Their Pleadings In Support Of Their  
Contention That Jurisdiction Is Proper**

Federal courts are courts of limited jurisdiction, and the party asserting jurisdiction bears the burden of establishing jurisdiction. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377, 114 S.Ct. 1673, 1675 (1994). When a defendant files a motion attacking subject matter jurisdiction based upon extrinsic evidence, as the Viejas Band has done in the instant motion, the allegations of the Complaint are *not* presumed true. "The presumption of correctness that we accord to a complaint's allegations falls away on the jurisdictional issue once a defendant proffers evidence that calls the Court's jurisdiction into question." Commodity Trend Service, Inc. v. Commodity Futurist Trading Comm'n., 149 F.3d 679, 685 (7<sup>th</sup> Cir. 1998). In such a case, the plaintiff must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction. Savage v. Glendale Union High School, 343 F.3d 1036, 1039, n.2 (9<sup>th</sup> Cir. 2003).

In the instant case, Plaintiffs incorrectly allege without any factual support that Viejas Fire Department entered into a "mutual aid agreement" with the Alpine Fire District and that by doing so, the Band supposedly waived sovereign immunity. Plaintiffs' argument lacks foundation and must be rejected. Plaintiffs have not submitted any evidence to corroborate the existence of the supposed "mutual aid agreement." Again, Plaintiffs cannot simply rely on the allegations raised in their Complaint. A motion to dismiss for lack of subject matter jurisdiction may be based on evidence outside of the pleadings. Gould Electronics, Inc. v. United States, 220 F.3d 169, 176 (3<sup>rd</sup> Cir. 2000). In such case, no presumption of truthfulness attaches to a plaintiff's allegations. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3<sup>rd</sup> Cir. 1977).

1       Based on the foregoing, the Viejas Band's motion to dismiss is proper and  
 2 should be granted. Plaintiffs have not, and cannot, establish that the Court has  
 3 jurisdiction over the Viejas Band.

4       **B. The State Legislature Cannot Rescind The Band's Sovereign Immunity**

5       Sovereign immunity is a long-established federal doctrine. Absent a clear  
 6 waiver by the tribe, only *Congress* may abrogate sovereign immunity. Oklahoma  
 7 Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509, 111  
 8 S.Ct. 905, 909 (1991). Accordingly, the California state legislature cannot revoke  
 9 sovereign immunity, as that authority rests solely with Congress. As such,  
 10 Plaintiffs cannot rely on California Health and Safety Code section 13863 in  
 11 support of their incorrect contention that the Viejas Band is not immune from suit  
 12 in this case. As Congress has not passed any law subjecting Indian tribes to suit  
 13 based upon claims arising out of the provision of government services, like  
 14 emergency response, Congress has not abrogated the Viejas Band's immunity.

15       **C. California Health and Safety Code Section 13863 Confers, Rather Than  
 16 Limits, Immunity**

17       The Fire Protection District Law of 1987 recognized the need for local  
 18 communities to establish fire protection districts in order to provide fire protection  
 19 and emergency medical services to the public. California Health and Safety Code  
 20 section 13863(a) permits local communities to contract with federal and state  
 21 agencies; cities; counties, special districts; federally recognized Indian tribes;  
 22 private firms; and corporations in order to do so.

23       Pursuant to California Health and Safety Code section 13863(b), when a fire  
 24 district enters into a mutual aid agreement with another entity for fire protection  
 25 services, that entity shall have *at least* the same immunity from liability for civil  
 26 damages on account of personal injury to or death of any person or damage to  
 27 property resulting from acts or omissions of its fire department personnel in the  
 28 performance of the provisions of the mutual aid agreement as is provided by law for

1 the district and its employees, except when the act or omission occurs on property  
 2 under the control of that entity.

3       Based on the foregoing, even assuming that Viejas Fire Department had  
 4 entered into a “mutual aid agreement” with the Alpine Fire District, which they did  
 5 not, the existence of any such agreement would not abrogate the Band’s immunity.  
 6 The intent of the statute is to provide the entity which has contracted with the fire  
 7 district with *at least* the same immunity as the traditional public entity.  
 8 Accordingly, the effect of the statute is to confer, rather than limit or waive,  
 9 immunity to an entity that enters into a mutual aid agreement with a fire district.  
 10 Thus, Plaintiffs’ claim that the statute results in a waiver of immunity is incorrect.  
 11 The Viejas Band has not waived immunity.

12 **D. The Viejas Band Has Not Made Any Express Waiver Of Sovereign  
 13                      Immunity**

14       A waiver of sovereign immunity may not be implied, but must be  
 15 unequivocally expressed. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct.  
 16 1670, 1676 (1978). “Nothing short of an express and unequivocal waiver can  
 17 defeat the sovereign immunity of an Indian nation.” American Indian Agric. Credit  
 18 Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1379 (8<sup>th</sup> Cir.  
 19 1985).

20       Plaintiffs cite C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian  
 21 Tribe of Oklahoma, 532 U.S. 411 (2001), and Smith v. Hopland Band of Pomo  
 22 Indians, 95 Cal.App. 4<sup>th</sup> 1 (2002) in support of their contention that by entering into  
 23 the alleged “mutual aid agreement” with the Alpine Fire District, the Viejas Band  
 24 waived immunity. However, Plaintiffs’ contention is, once again, misplaced. In  
 25 both C & L and Smith, the tribes entered into contracts in which the tribes  
 26 consented to jurisdiction and waived immunity from suit. Here, there is no such  
 27 contract, and there has been no waiver of immunity by the Viejas Band.

28

1       **E. The Court Lacks Subject Matter Jurisdiction Over The Viejas Band**

2              Plaintiffs cannot overcome the Viejas Band's immunity. Moreover, the  
 3              Court does not possess federal question jurisdiction or supplemental jurisdiction in  
 4              this case, as set forth in the Band's moving papers.

5              Although Plaintiffs do not deny that the Court lacks federal question  
 6              jurisdiction over the Band, Plaintiffs contend that the Court possesses supplemental  
 7              jurisdiction over the Band. Plaintiffs allege that the events that form the basis of  
 8              Plaintiffs' federal claims against the County of San Diego (hereinafter the  
 9              "County") occurred during the same hour as the events that form the basis of  
 10             Plaintiffs' state claims against the Viejas Band, and that therefore, a common  
 11             nucleus of operative fact exists between Plaintiffs' federal and state claims  
 12             sufficient to permit the Court to exercise supplemental jurisdiction over the Viejas  
 13             Band. However, Plaintiffs' contention is incorrect.

14             Plaintiffs' federal claims are based on the County's decision to hire of Lowell  
 15             Bryan Bruce as a deputy, and on the allegation that the County's deputies used  
 16             excessive force when they responded to the scene of the incident. Plaintiffs' state  
 17             claim against the Viejas Band is based on whether Viejas Fire Department acted  
 18             with the requisite standard of care in providing emergency medical services to  
 19             Kristin Maxwell-Bruce. Accordingly, the facts related to the County's hiring  
 20             process and the conduct of the County's deputies are distinct from the facts related  
 21             to the standard of care exercised by Viejas Fire Department. As such, there is no  
 22             basis for the Court to extend supplemental jurisdiction over the Band.

23             Plaintiffs also contend that the Court should exercise supplemental  
 24             jurisdiction because it would be difficult to have separate trials against all of the  
 25             Defendants. However, all of the Defendants in this matter have filed motions to  
 26             dismiss. If any of those motions are granted, then the number of issues at trial will  
 27             be reduced, and trial will be simplified. As a result, the Court would have little, if  
 28             any, interest in retaining supplemental jurisdiction.

1                   **II.**2                   **CONCLUSION**3                   For these reasons, the Viejas Band respectfully requests that the Court  
4                   dismiss all claims against its fire department for lack of jurisdiction.5  
6                   DATED: February 25, 2008

HIGGS, FLETCHER &amp; MACK LLP

7  
8                   By: /S/ Phillip C. Samouris  
9                   PHILLIP C. SAMOURIS, ESQ.  
10                  MICHELLE L. GRANT, ESQ.  
11                  Attorneys for Specially Appearing  
12                  Defendants Viejas Band of  
13                  Kumeyaay Indians

## **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing document

**MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO  
PLAINTIFF'S OPPOSITION TO THE MOTION TO DISMISS FILED BY  
SPECIALY APPEARING DEFENDANT VIEJAS BAND OF  
KUMEYAAY INDIANS**

was served on counsel as indicated below by CM/ECF:

Attorney for Plaintiffs  
Charles G. La Bella, Esq.  
Steven T. Coopersmith, Esq.  
**La BELLA & McNAMARA LLP**  
**401 West A Street, Suite 1150**  
**San Diego, CA 92101**  
**Phone: Telephone (619) 696-9200**  
**Fax: Facsimile: (619) 696-9269**  
**Email: scoopersmith@labellamcnamara.com**

Attorney for Defendant  
Alpine Fire District  
Stephen M. Caine, Esq.  
Haight Brown & Bonesteel LLP  
3750 University Avenue, Ste. 2400  
Riverside, CA 92501-3313  
Telephone: (951) 341-8300  
Fax: (951) 341-8309  
email: [scaine@hbblaw.com](mailto:scaine@hbblaw.com)

Attorney for Defendant  
County of San Diego  
Morris G. Hill, Esq.  
County of San Diego Office of  
County Counsel  
1600 Pacific Highway, Rm. 355  
San Diego, CA 92101-2469  
Telephone: (619) 531-5649  
Fax: (619) 531-6005  
Email: morris.hill@sdcounty.ca.gov

Attorney for Defendant  
Lowell Bryan "Sam" Bruce

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 25, 2008, at San Diego, California.

/s/ Phillip C. Samouris

Phillip C. Samouris